(2)

No. 91-1196

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

T.L. HEGGY,
Petitioner,

v.

CATHERINE A. HEGGY,
Respondent.

Petition For A Writ of Certiorari to the United States Court of Appeals For The Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the director of a state law enforcement agency who:

(a) uses his official position to order the use of state agency personnel and equipment to install a wiretap for the undisclosed purpose of secretly tapping his wife's telephone conversations,

(b) attempts to use the intercepted telephone conversations to secure personal benefits, and

(c) discloses the taped contents of the conversations to a third party,

enjoy immunity from an action by his ex-spouse invoking the civil remedies provided by Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §2520, because he was married to the plaintiff when he committed these acts?

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Defendant was Director of the Oklahoma State Bureau of Narcotics and Dangerous Drugs ("State Bureau of Narcotics" or "Bureau") during the course of conduct for which liability has been imposed upon him. (10th, 10a; Tr. II at 8.)[1] The

[1]Defendant is no longer Director of the State Bureau of Narcotics. (Tr. II at 8.)

All references to the lower courts' decisions will be to the defendant's appendix, and will be preceded by identification of the court ("10th, ___ a;" "D.Ct., ___ a"). References to the record will be to the transcript ("Tr.") followed by the volume and page numbers thereof.

State Bureau of Narcotics is "a State Police organization" with "pure State Police powers," in the words of defendant at trial. (Tr. II at 12.)

The Heggys were married in 1979 (Tr. I at 138) and divorced in 1987. (10th, 10a). During the last three years of their marriage defendant began to repeatedly and seriously tell plaintiff that he wanted a divorce. (Tr. I at 147; 10th, 10a.) During this time, the Heggys lived on a farm (Tr. I at 138), where they also conducted "a horse operation." (Tr. II at 24.)[2] The horse operation included "a huge steel barn, 100 by a 100." (Tr. II at 24.) The Heggys used this barn for their business, renting the stalls to third parties wishing to board horses. (*Id.*) In addition to other structures used in the business, the Heggys' home was located on the farm. (*Id.* at 24.)

The Heggys' telephones were listed under the names of Tom Heggy and "Double AA Stables." (Tr. II at 26.) One phone was located in the barn. (*Id.* at 27.)

About six months before their divorce, defendant – acting in his official capacity as Director of the State Bureau of Narcotics – instructed one of the agents of that Bureau to assist him with a criminal "internal investigation" of purported death threats against him. (Tr. I at 5.)[3] Defendant

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[2]The Heggys employed one person part-time, whom they used in the business. (*Id.* at 25-26.)

[3]The agent was never furnished any evidence of the death threats (Tr. I at 18). The Bureau's subsequent investigation of the propriety of defendant's wiretap never produced any tape or verification of any death threats (Tr. I at 64), and although the tapes of conversations intercepted by defendant never disclosed any threat, defendant

told the agent that he needed the wiretap specifically so that "he could record these death threats as part of that investigation." (Tr. I at 5.) Defendant ordered the agent to place the wiretap in the horse barn, stating that he wanted to record remotely, because the "family" was not aware of the purported death threats and he did not want to concern them. (Tr. I at 6 and 9.)[4]

The agent did as he was instructed, but cautioned defendant that the consent of one of the parties to a telephone call was necessary to record the call. (10th, 10a; Tr. I at 12.)[5] Subsequently, the agent prepared an official report of the matter, which spawned an internal investigation of defendant's use of departmental personnel and resources to install the wiretap. (Tr. I at 17-18.) In the absence of confirmed death threats, it would not be appropriate for State Bureau of Narcotics personnel and equipment to be used. (Tr. I at 76.) Defendant told the departmental investigators that he had tapped the phone because of the death threats, and obtained tapes of his wife's conversations with third parties "by accident." (Tr. I at 68.)

In fact, however, defendant used his official law enforcement position to install the wiretap so that he could record plaintiff's telephone conversations. He did so for nearly three months. (10th,

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kept listening to the tapes, at least once a week. (Tr. II at 89-90; Tr. I at 74.) The jury rejected defendant's contention that he ordered the wiretap as part of an internal investigation of death threats. (10th, 11a.)

[4]Defendant and plaintiff had no children, and lived alone in their house. (Tr. II at 24.)

[5]Title III permits a person to tape record his own telephone conversations, providing it is not done for a criminal or tortious purpose. 18 U.S.C. §2511(2)(d). Oklahoma has a similar provision. 13 Okla. Stat. (1991 Supp.), §176.4(5).

10a.) During the time the wiretap was installed, plaintiff spoke to many persons, including her father, her mother, her sister, and her grandmother who was visiting from England. (Tr. I at 111-112.) Defendant retrieved the tapes and listened to them on weekends or whenever he had time in the evenings. (Tr. II at 85 and 87.) Defendant catalogued and recorded the interceptions, labelling them by date and content. (10th, 10a.) He played at least one of the conversations for his secretary at the Bureau, and told her the day immediately after his divorce from plaintiff that "he had a table full of tapes and he had taken [plaintiff] to the cleaners." (Tr. I at 78-80.) Additionally, defendant used the tapes to threaten plaintiff's father, at one point throwing a handful of bills on his father-in-law's desk, stating he would not pay them, and that if his pending divorce case was not settled on his terms he would introduce the tapes into evidence. (Tr. I at 95 and 98.)[6]

After the parties were divorced, plaintiff commenced this action, invoking the civil liability provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 ("Title III"), 18 U.S.C. §2520. Defendant moved to dismiss the action, asserting that he could not be held liable for this conduct because he had perpetrated it against his spouse, and that the case presented solely a "domestic dispute" which public policy relegated to a state court. (D.Ct., 26a.) The court determined that there was no interspousal immunity from civil actions under 18 U.S.C. §2520. (D.Ct.

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[6]Defendant also threatened plaintiff directly, for example, telling her that he hoped her "mother's health was good" since he intended to use the tapes to hurt her. (Tr. I at 157.)

29a-32a.) Upon a jury trial, plaintiff was awarded $75,000 in compensatory damages and $140,000 in punitive damages. (10th, 11a.)

The Tenth Circuit affirmed. In the Tenth Circuit, defendant primarily relied upon *Simpson v. Simpson*, 490 F.2d 803 (5th Cir.), *cert. denied*, 49 U.S. 897 (1974). The Tenth Circuit noted that "the *Simpson* court candidly expressed 'considerable doubt' about its holding" and had limited it to the specific facts of its case (10th, 16a n.6); that the Fourth, Sixth, and Eighth Circuits had all subsequently held that interspousal wiretapping was actionable under Title III (10th, 12a); that the unambiguous language of the statute granted a civil remedy against (and to) "any person," providing specific exceptions which did not include interspousal wiretapping (10th, 15a-16a); that the legislative history of Title III plainly demonstrated a congressional purpose of prohibiting electronic eavesdropping between spouses (10th, 17a-18a); and that Congress had overhauled Title III in 1986, revising nearly every section of Title III, and still did not provide an exception for interspousal wiretapping. (10th, 18a.)[7]

[7]The Tenth Circuit also distinguished its decision approximately one month earlier in *Newcomb v. Ingle*, 944 F.2d 1534 (10th Cir. 1991). (10th, 9a n.1.) In *Newcomb*, plaintiff sued his mother and maternal grandfather for tape recording his telephone conversation (when he was a minor) with his father, who was then divorced from his mother. The defendants had recorded a conversation in which plaintiff's father had instructed plaintiff and his brother to set fire to their home. The tapes ultimately prompted criminal charges against plaintiff's father, resulting in a conviction. *Newcomb*, 944 F.2d at 1535. Plaintiff's father later stipulated to the severance of his parental rights, and plaintiff and his brother were designated as children in need of care under state law. *Id.* That fact situation was held by the court in *Newcomb* to present a "qualitatively different" question from interspousal wiretapping for purposes of applying Title III. *Id.* at 1535-36.

ARGUMENT AND AUTHORITIES

I. ANY CONFLICT WHICH MAY EXIST DOES NOT EXTEND TO THE CIRCUMSTANCES OF THIS CASE

The four federal circuit courts which have held that Title III applies to wiretaps between spouses have done so firmly and unequivocally.[8] In contrast, the two circuit courts' decisions which defendant claims to conflict with the decision below were expressly and carefully limited to the specific facts before those courts,[9] creating an invitation to other courts to distinguish rather than disagree with their holdings.[10] Indeed, the

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[8]*Heggy v. Heggy* (10th, 8a); *Kempf v. Kempf,* 868 F.2d 970 (8th Cir. 1989); *Pritchard v. Pritchard,* 732 F.2d 372 (4th Cir. 1984); *United States v. Jones,* 542 F.2d 661 (6th Cir. 1976) (criminal case); *Fultz v. Gilliam,* 942 F.2d 396, 400 (6th Cir. 1991) (applying rule of *Jones* in civil case).

[9]*Simpson v. Simpson,* 490 F.2d 803, 810 (5th Cir. 1974) ("Our decision is, of course, limited to the specific facts of this case. No public official is involved, nor is any private person other than appellee, and the *locus in quo* does not extend beyond the marital home of the parties."); *Anonymous v. Anonymous,* 558 F.2d 677, 679 (2d Cir. 1977) ("We do not condone the husband's activity in this case, nor do we suggest that a plaintiff could never recover damages from his or her spouse under the federal wiretap statute. We merely hold that the facts of this case do not rise to the level of a violation of that statute.")

[10]Instead, other courts have done both. *E.g., United States v. Jones,* 542 F.2d 661, 672 (6th Cir. 1976) ("Even if *Simpson* was correctly decided on its facts, this case is clearly distinguishable."); *Kempf v. Kempf,* 868 F.2d 970, 972 (8th Cir. 1989) ("*Simpson,* although relied upon by the district court, has been widely criticized." [Citations omitted.]); *Rickenbaker v. Rickenbaker,* 226 S.E.2d 347, 352 (N.C. 1976) (criticizing *Simpson's* analysis and distinguishing the case factually, as subsequently noted in *Pritchard, supra,* 732 F.2d at 373); *Remington v. Remington,* 393 F.Supp. 898, 901 (E.D.Pa. 1975) (distinguishing *Simpson* on ground, among others, that spouse in *Remington* involved a third party in the installation of the wiretap); *Gill v. Willer,* 482 F.Supp. 777, 778 (W.D.N.Y. 1980) (distinguishing *Anonymous* on ground, among others, that "tape was played before other persons."). Additionally, the limitation of the holdings in *Simpson* and *Anonymous* did not stop the virtually unanimous denunciation of those decisions by commentators. *E.g.,* J. Carr, *The Law of Electronic Surveillance* §3.6 (2d ed. 1991); Rowe,

Fifth Circuit has now twice emphasized the limited effect of its holding in *Simpson*,[11] and in the Second Circuit two district court decisions have distinguished *Anonymous* — one which was affirmed by the Second Circuit,[12] and one which, in addition to distinguishing *Anonymous*, openly criticized the holding of *Simpson*.[13]

The opinions in *Simpson* and *Anonymous* strongly indicate that neither of those courts would have decided this case any differently than did the Tenth Circuit.

Wiretapping and the Modern Marriage: Does Title III Provide a Federal Remedy for Victims of Interspousal Electronic Surveillance?, 91 Dickinson L. Rev. 855 (1987); Kepler, *Title III and the Classic Triangle: Should the Immunity Doctrine Apply to Interspousal Electronic Surveillance?*, 12 Creighton L. Rev. 1209 (1979); Note, *Interspousal Electronics Surveillance and Title III*, 12 Valparaiso L. Rev. 537 (1978); Comment, *Electronic Surveillance, Neither the Plain Language nor the Legislative History of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 Justifies an Implied Exception for Interspousal Wiretaps*, 11 Georgia L. Rev. 427 (1977); Comment, *Interspousal Electronic Surveillance*, 7 Toledo L. Rev. 185 (1975).

[11] *United States v. Schrimsher*, 493 F.2d 848, 850-51 (5th Cir. 1974) (Referring to *Simpson:* "The Court expressed doubts about even this limited exclusionary construction of the statute, however, and emphasized that 'No public official is involved, nor is any private person other than appellee [the wife], and the *locus in quo* does not extend beyond the marital home of the parties.' "); *Briggs v. American Air Filter Co., Inc.*, 630 F.2d 414, 419 n.7 (5th Cir. 1980) ("However, the holding of that case [*Simpson*] was carefully limited to its facts at the time, [citation omitted], and has been so limited by other courts.").

[12] In *Citron v. Citron*, 539 F.Supp. 621, 623 and 624 n.3 (S.D.N.Y. 1982) the court stated: "[U]nlike the situation in *Anonymous* — the interceptions here involved were alleged to have been automatic and continuous throughout a several month period, and were concededly not confined to conversations between the husband and persons directly related to the pending marital action." The court granted a motion to dismiss, however, finding on the basis of the jury verdict that defendant did not act "willfully." The Second Circuit affirmed on this ground, not addressing *Anonymous* but characterizing the district court's decision as a "careful opinion." *Citron v. Citron*, 722 F.2d 14, 15 (2d Cir. 1983).

[13] *Gill v. Willer*, 482 F.Supp. 776, 778 (W.D.N.Y. 1980).

In *Simpson*, the court held that Title III did not apply where a husband obtained his own device for tapping and recording telephone conversations, personally attached the device to the phone lines within his own home, and intercepted conversations between his wife and another man. *Id.* at 804. In holding that Title III could not be invoked by the former wife, the court stated that Title III was "part of a crime control act," *id.* at 806, and that it "was intended to protect individuals against invasions of their privacy by sophisticated surveillance devices." *Id.* The court opined that to provide a remedy would interfere with marital grievances and would "override" state interspousal tort immunity, *id.*, n.7. The court emphasized that there was no third party involved in the intrusion into the marital home, *id.* at 808-809.[14] In its conclusion the court stated:

> As should be obvious from the foregoing, we are not without doubts about our decision. . . . Our decision is, of course, limited to the specific facts of this case. *No public official is involved, nor is any private person other than appellee, and the locus in quo does not extend beyond the marital home of the parties.*

(Emphasis supplied.) *Id.* at 810.

In contrast, in the instant case a public official *was* involved (defendant himself), as was a law enforcement agent under the direction of defendant, and the place in which the wiretap was placed was not in the marital home, but on

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[14]"However, to our minds a third-party intrusion into the marital home, even if instigated by one spouse, is an offense against a spouse's privacy of a much greater magnitude than is personal surveillance by the other spouse." *Id.* at 809.

the premises of the joint business of the parties.[15]

In *Anonymous*, a divorced wife sued her ex-husband for purported violations of Title III during the two years preceding their divorce. The plaintiff had previously suffered from an "unstable mental condition," and at one point had abducted her daughter, resulting in her arrest and the suspension of her visitation rights.[16] One year before the divorce, the State Family Court had ordered plaintiff to refrain from using foul and abusive language over the telephone to her husband and children. *Id.* at 678. The husband purchased a telephone answering machine, which would automatically answer and record a telephone call for 45 seconds; the husband instructed his son to turn a knob marked "record" on the machine whenever the wife called, thus tape recording her conversations beyond the 45 second period. *Id.* at 678. If the husband was at home, he could hear the conversation on a loudspeaker, and if he was not he could play back the recordings later. *Id.* The court held that Title III did not cover the husband's conduct, which the court believed was not materially different from listening into his wife's telephone conversations on an extension phone. The court opined that the use of such an extension phone would be in the "ordinary course of [the user's] business" within the meaning of 18 U.S.C. §2510(5)(a)(i), and thus would not constitute the use of an "electronic, mechan-

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[15]Also, Oklahoma has never recognized interspousal tort immunity, a doctrine which (aside from being inapposite to an action for violation of a federal wiretap statute) has now been wholly or partially abrogated in all but three states, as discussed in Proposition III.

[16]*Anonymous, supra*, 558 F.2d at 678.

ical or other device." *Id.* at 678-79.[17] The court held: "We do not condone the husband's activity in this case, nor do we suggest that a plaintiff could never recover damages from his or her spouse under the federal wiretap statute. We merely hold that the facts of this case do not rise to the level of a violation of that statute." *Id.* at 679. In so restricting its holding, the court distinguished cases where the defendants had – as in the case here – indiscriminately taped all incoming and out-going calls. *Id.* at 679. The court explained that the defendants in those cases "thus invaded the privacy of innumerable persons, known and unknown." *Id.*

Thus the instant case falls within the same distinction cited by a district court in the Second Circuit, that "unlike the situation in *Anonymous* -- the interceptions here involved were alleged to have been automatic and continuous throughout a several month period, and were concededly not confined to conversations between the husband and persons directly related to the pending marital action." *Citron v. Citron,* 539 F.Supp. 621, 623 (S.D.N.Y. 1982), *aff'd,* 722 F.2d 14 (2d Cir. 1983).

II. THE PURPORTED CONFLICTS BETWEEN STATE SUPREME COURTS AND THEIR RELEVANT CIRCUIT COURTS DO NOT WARRANT REVIEW OF THIS CASE

Defendant does not claim that the Tenth Circuit's decision for which review is sought con-

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[17]This of course is a different question than the one sought to be presented by defendant here. *See generally* Annot., *Application to Extension Telephones of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 USCS §§2510 et seq.), Pertaining to Interceptions of Wire Communications,* 58 A.L.R. Fed. 594 (1982).

flicts with any decision of a state supreme court within the Tenth Circuit. However, defendant claims that there is a conflict between decisions of circuit courts and state supreme courts in the Fourth and Eleventh Circuits. *Boumrind v. Ewing*, 279 S.E.2d 359 (S.C.), *cert. denied*, 454 U.S. 1092 (1981) is claimed to conflict with the Fourth Circuit's *Pritchard* decision, and *Ex Parte O'Daniel*, 515 So.2d 1250 (Ala. 1987) is claimed to conflict with the Fifth Circuit's *Simpson* decision.

In *Boumrind*, which was decided three years before *Pritchard*, a husband personally installed an extension telephone and recording device in his home, then listened in to and recorded his wife's unfaithful conversations.[18] The issue in *Boumrind* was whether Title III required the supression of the husband's tape recordings of his wife's telephone conversations in an action by the husband against a third party for "alienation of affection and criminal conversation." *Id.* 279 S.E.2d at 359. The court could not disagree with *Pritchard* (since it had not been decided), and in discussing the opinions of the Sixth Circuit in *Jones* and the Fifth Circuit in *Simpson*, simply held that it found the latter "more factually apposite to the case at bar." *Id.* at 360.

In *Ex Parte O'Daniel*, the Alabama Supreme Court concluded that Title III prohibited spousal wiretapping and that the trial court properly excluded the wife's tapes of telephone conversations between the husband and his alleged paramour in a divorce action. *Id.*, 515 So.2d at 1252-53.

[18] *Boumrind, supra*, 279 S.E.2d at 359. The husband would personally monitor the phone and apparently activate the recorder. "He sometimes spent entire days listening in on and recording his wife's telephone conversations with Ewing." *Id.*

The other state courts of last resort to consider the matter have likewise found that Title III applies to interspousal wiretapping. *See Pulawski v. Blais,* 506 A.2d 76, 77 n.2 (R.I. 1986); *Rickenbaker v. Rickenbaker,* 226 S.E.2d 347, 352 (N.C. 1976); *Marano v. Holland,* 366 S.E.2d 117, 133 (W.V. 1988) (apparently *dictum*).[19]

Here, the only state supreme court decision approving of defendant's view (*Boumrind*) is from another circuit, based upon conspicuously different facts,[20] and decided before most of the relevant courts of appeals' decisions – including the one from its own circuit – were even rendered. This presents no cause for review of the decision below.

III. THE DECISION BELOW PROPERLY APPLIES TITLE III AND DOES NOT CONFLICT WITH STATE DOMESTIC RELATIONS LAW

A. Defendant's Abuse of His Law Enforcement Powers Obviates Any Need to Reach the Question He Seeks to Present.

The Tenth Circuit quoted each of the relevant provisions of 18 U.S.C. §2511(1) in effect at the time defendant ordered the installation of the wiretap. (10th, 13a.) Defendant committed several violations. He (a) willfully intercepted numerous wire communications; (b) willfully procured another person, a State Bureau of Narcotics agent, to intercept wire communications; (c) willfully

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[19]In *In re Marriage of Lopp,* 378 N.E.2d 414 (Ind. 1978), the court noted but found it unnecessary to decide the issue.

[20]There was no public official, no assistance of a third party, and no continuous and indiscriminate recording.

disclosed to another person, his secretary at the Bureau, the contents of the communications, having reason to know that the information was obtained in violation of Title III; and (d) willfully used the contents of the communications against both plaintiff and her father, having reason to know that the information was obtained in violation of Title III. Defendant argues that "principles of comity and federalism" dictate immunity from any of these violations because he committed them when he was married to plaintiff.

Defendant implicitly discounts the significance of his abuse of his powers as a state law enforcement official, his use of law enforcement personnel and equipment to install the wiretap, and his use of the fruits of the wiretap to threaten third parties. This alone would bring the case out of the realm of a purely "domestic conflict," a term which should be used with care, as discussed below. Even defendant acknowledges that one goal of Title III was to circumscribe the conditions under which "law enforcement personnel . . . could permissibly tap telephones – and to provide penalties when they did not follow the law." (Pet. for Cert. at 21, n.20.)

Defendant asserted below that his wiretapping was part of a criminal investigation and he needed the wiretap so that he could record alleged "death threats as part of that investigation." (Tr. I at 5.) The jury rejected this contention. (10th, 11a). Electronic eavesdropping which is part of a criminal investigation is unquestionably one "area of activity for which Title III was written." *United States v. McIntyre*, 582 F.2d 1221, 1224 (9th Cir. 1978) (affirming criminal conviction of chief of

police and lieutenant in police department for electronic eavesdropping on conversations of assistant chief of police, rejecting defendants' contention that their conduct was justified as an "internal affairs investigation.")

Law enforcement personnel must observe the requirements of Title III in *all* circumstances; for example, a civil remedy is provided to inmates in state prisons when their rights under the Act are violated. *See Campiti v. Walonis*, 611 F.2d 387 (1st Cir. 1979). Defendant's contention here is that his own spouse did not have the same right to protest his abuse of the state police power as would a prison inmate.[21] Inasmuch as defendant's abuse of his law enforcement authority would in itself be sufficient reason to affirm here,[22] the question presented by defendant would not even need to be reached in this case.

B. The Application of Title III to Electronic Surveillance Between Spouses Does Not Encroach on "Domestic Relations" Matters.

The application of federal law governing wiretaps to spouses does not intrude into "domestic relations," as contended by defendant.[23] De-

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[21]As explained by one state court, citing commentary on Title III in interpreting its own state's counterpart to the Act: "To recognize interspousal immunity in this context would reward the surreptitious spouse while according the privacy of the targeted spouse less protection than is provided for suspected criminals." *State v. Jock*, 404 A.2d 518, 520 (Del.Super.Ct. 1979). *See also* 10th, 19a n.8, final sentence.

[22]This Court reviews judgments, not opinions, *Bowen v. American Hospital Ass'n*, 476 U.S. 610, 625 n.11 (1986), and a judgment may be defended on any ground which the law and the record permit which will not expand the relief granted. *United States v. New York Telephone Co.*, 434 U.S. 159, 166 n.8 (1977).

[23]The Tenth Circuit correctly rejected this assertion (10th, 18a-19a), quoting from

fendant's more extreme contention, that Congress should not be presumed to have legislated on a matter which would reach a domestic *conflict*, is another proposition altogether, which is wholly unsupported by the decisions of this Court which he cites.

First, this Court has never defined "domestic relations" in the broad manner urged by defendant, *i.e.*, as any act committed against one's spouse. Each of the cases cited by defendant were appeals from state divorce proceedings, and involved a real or alleged conflict between a federal act and a state law regulating the terms of marital separation.[24] Second, these decisions do not, as defendant contends, create any presumption that Congress does not intend to legislate on any matter affecting the rights of persons who are spouses; rather, the decisions hold that in the

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the oft-cited decision in *Kratz v. Kratz*, 477 F.Supp. 463, 475-476 (E.D.Pa. 1979). The court in *Kratz* stated: "Finally, Title III is not, as the defendants suggest, an intrusion by the federal government into the law of domestic relations, a subject traditionally left to the states. Title III regulates electronic eavesdropping, not marital relations. It proscribes one method of gathering evidence for use in, *inter alia*, domestic relations cases, but in no manner deals with the merits of such cases. The statute is unconcerned with questions of divorce, support, custody, property, etc. . . .."

[24]*See Mansell v. Mansell*, 490 U.S. 581 (1989) (conflict between divorce decree under state community property law and federal act governing division of military retirement pay upon divorce of retired member of military); *Rose v. Rose*, 481 U.S. 619 (1987) (conflict between Tennessee statute allowing state courts to require payment of child support from veterans' disability benefits and federal act governing veterans' disability benefits); *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979) (conflict between California community property award upon dissolution of marriage and provisions of Railroad Retirement Act of 1974); *Wetmore v. Markoe*, 196 U.S. 68 (1904) (question of whether divorce court's award of alimony and child support was dischargeable under Bankruptcy Act of 1898). Finally in *Ohio ex rel. Popovici v. Agler*, 280 U.S. 379 (1930), this Court held that federal statutes granting jurisdiction over civil actions involving consuls and vice consuls do not extend federal jurisdiction over divorce. *Id.* at 383.

absence of a positive contrary indication, Congress will not be presumed to have enacted a law which conflicts with a state law governing domestic relations.[25]

This case concerns wiretapping by a state law enforcement official of his spouse, using government resources and property. It does not concern the application of any state law governing domestic relations, and Title III is not contended by defendant to conflict with *any* Oklahoma law, much less one governing domestic relations.

Defendant has confused a federal policy against intrusion into state domestic relations matters (*e.g.*, divorce, property division, alimony, child support) with a supposed federal policy against regulation of *any* conduct affecting rights between spouses.[26] Defendant's argument reduces to the assertion that all married persons are stripped of the protection of the entire pano-

[25]*See Hisquierdo v. Hisquierdo, supra,* 439 U.S. at 581 (California state community property law under which divorce court's award to wife was made was preempted under Railroad Retirement Act of 1974: "On the rare occasion when state family law has come into conflict with a federal statute, this Court has limited review under the Supremacy Clause to a determination whether Congress has 'positively required by direct enactment' that state law be preempted."); *Mansell v. Mansell,* 490 U.S. at 587 (California domestic relations law was preempted by federal law, construing Uniformed Services Former Spouses Protection Act, 10 U.S.C. § 1408); *Rose v. Rose, supra,* 481 U.S. at 625 (Tennessee statute allowing state courts to require payment of child support from veterans' disability benefits was not preempted by federal law).

[26]*See Kratz v. Kratz, supra,* 477 F.Supp. at 476.

ply of federal criminal and civil laws insofar as the conduct of their spouses are concerned, in the absence of a specific Congressional expression to the contrary.[27]

Defendant apparently also contends that a Title III action somehow becomes an adjunct to a divorce proceeding when the violation of the Act was committed against a spouse and a divorce has recently taken place. (*See* Pet. for Cert. at 17-18.) This has no more logic than an argument that a claim against an ex-spouse for assault and battery should be deemed a collateral attack on the terms of the divorce decree if the divorce occurred after the assault. Further, defendant incorrectly reports to this Court that there was evidence in this case suggesting that plaintiff filed this Title III action "in an effort to upset the state judgment and secure a greater 'net judgment' from the divorce than the state court believed she was entitled to." (Pet. for Cert. at 18.) There was no such evidence.[28]

C. The Tenth Circuit's Analysis Was Sound.

The Tenth Circuit's analysis of this case was entirely sound. First, the court observed that 18 U.S.C. §2520 unambiguously provides a civil claim "against any person" violating the Act, and

[27]For example, there would presumably be immunity from criminal prosecution for sending a bomb through the mail addressed to one's spouse (or under petitioner's theory to any family member), although 18 U.S.C. §1716 would make it a felony to mail the bomb to anyone else.

[28]Defendant apparently seeks to draw this nonsequitur from the fact that plaintiff appealed the divorce decree. (Pet. for Cert. at 5.) Defendant's only citation to the record (Tr. I at 104-105) is the testimony of plaintiff's father on cross-examination of defendant's counsel as to whether plaintiff was happy with the divorce decree, and does not relate to any purported effort to use this action to upset the state judgment or secure a greater net judgment from the divorce.

§2510(6) defines "person" as "any individual." (10th, 14a-15a.)[29] Other courts (state and federal) rejecting the view propounded by defendant have held likewise.[30]

The Tenth Circuit also observed that Title III provides specific exceptions to the Act, and domestic conflicts is not among them. (10th, 15a-16a.)[31] This Court had previously held that the purpose of the Act was to prohibit "all interceptions of oral and wire communications, except those specifically provided for in the Act, most notably those interceptions permitted to law enforcement officers when authorized by court order in connection with the investigation of the serious crimes listed in §2516." *United States v. Giordano*, 416 U.S. 505, 514 (1974). Finally, the Tenth Circuit cited the compelling legislative history, which leaves no doubt that the legislature intended Title III to cover interspousal wiretapping. (10th, 17a-18a.)[32]

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[29]This was in accord with this Court's method of construing federal statutes. *E.g., Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985) ("In construing a federal statute it is appropriate to assume that the ordinary meaning of the language that Congress employed 'accurately expresses the legislative purpose.' ").

[30]*E.g., Kempf v. Kempf, supra*, 868 F.2d at 972-73; *Pritchard v. Pritchard, supra*, 732 F.2d at 373; *United States v. Jones, supra*, 542 F.2d at 666-67; *Ex parte O'Daniel, supra*, 515 So.2d at 1253 (Alabama); *Rickenbaker v. Rickenbaker, supra*, 226 S.E.2d at 352 (North Carolina); *Turner v. PV Int'l Corp.*, 765 S.W.2d 455, 469-70 (Tex.Ct.App. 1988), *writ ref'd per curiam*, 778 S.W.2d 865 (Tex. 1989) (neither approving or disapproving this holding); *Stamme v. Stamme*, 589 S.W.2d 50, 52-53 (Mo.Ct.App. 1979); *Heyman v. Heyman*, 548 F.Supp. 1041, 1045 (N.D.Ill. 1982); *Flynn v. Flynn*, 560 F.Supp. 922, 925 (N.D.Ohio 1983); *Gill v. Willer*, 482 F.Supp. 776, 778 (W.D.N.Y. 1980); *Kratz v. Kratz*, 477 F.Supp. 463, 467-68 (E.D.Pa. 1979).

[31]This also was in keeping with this Court's method of statutory construction. *See Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980).

[32]Perhaps the most thorough account of this legislative history is found in *United States v. Jones, supra*, 542 F.2d at 667-670. It is hard to know what defendant means

D. Defendant's Remaining Arguments Have No Merit.

(1) Criminal Enforcement.

Defendant asserts that an absence of reported decisions relating to federal criminal enforcement of Title III for interspousal wiretapping supports his construction of the Act. (Pet. for Cert. at 20.) First, the leading decision in *United States v. Jones*, 542 F.2d 661 (6th Cir. 1976) was a federal criminal prosecution for interspousal wiretapping (*outside* the family home — as was defendant's wiretapping in the instant case). There are several other relevant reported criminal enforcement decisions.[33] Further, an absence of reported

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by his reference to "the minutia of legislative history" (Pet. for Cert. at 17). Inasmuch as the unambiguous language of the Act contradicts defendant's contention, the argument appears to be that *both* the language of the Act *and* the legislative history should be ignored. The legislative history is literally deluged with references to the purpose of regulating wiretapping between spouses. One example noted by the Tenth Circuit is the statement of a co-sponsor of the bill that: "A broad prohibition is imposed on private use of electronic surveillance, particularly in domestic relations and industrial espionage situations." S.Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 2112, 2274. The statements of a bill's sponsor are properly considered in construing the provisions of the bill. 2A Sutherland Stat. Const. §48.15 (5th ed.). As noted in the leading treatise on electronic surveillance, in repudiating any contention that Title III does not apply between spouses: "Unlike law enforcement surveillance, no witness at any of the congressional hearings and no congressman in any of the debates on Title III spoke in favor of private nonconsensual eavesdropping." J. Carr. *The Law of Electronic Surveillance* §3.6 at 3-109 (2d ed. 1991).

[33]There is at least one reported decision of a federal criminal prosecution (and conviction) involving interspousal wiretapping, not against the wiretapping spouse but against a private investigator who either installed the electronic device or procured the spouse to install the device "i.e., gave her the device, told her to install it, and instructed her how to install it." *United States v. Rizzo*, 583 F.2d 907, 909-910 (7th Cir. 1978). There are also reported state court decisions of criminal enforcement for interspousal wiretapping under state counterparts to Title III. *See State v. Jock*, 404 A.2d 518 (Del. 1979) (defendant charged with willfully and without consent intercepting wife's telephone conversations; court relied upon commentary on Title III in rejecting contention of interspousal immunity); *People v.*

decisions would of course be no indication that the law had not been criminally enforced. Moreover, a lack of reported decisions would obviously not rise to the level of an administrative interpretation (*e.g.*, a rule or regulation) of the type for which the rule of statutory construction relied upon by defendant is engaged. *See generally* 2B Sutherland Stat. Const. §49.05 and §49.06 (5th ed.).

(2) Interspousal Tort Immunity.

Defendant's argument that interspousal *tort* immunity is somehow involved in this action is also incorrect. Oklahoma does not recognize, and has never recognized interspousal tort immunity.[34] More fundamentally, an action for violation of a federal statute prohibiting electronic wiretapping is not governed by state tort law doctrines.[35] State law of interspousal immunity cannot be applied to defeat a federal right which plaintiff would otherwise already possess, *Byrd v. Byrd*, 657 F.2d 615, 620 (4th Cir. 1981) (admiralty case), and is particularly irrelevant in applying a

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Snowdy, 237 Cal.App.2d 677, 47 Cal.Rptr. 83 (1965) (prosecution of both husband and investigators for wiretapping wife); *Kendrick v. State*, 182 S.E.2d 525 (Ga.Ct.App. 1971) (prosecution of detective for interspousal wiretap); *Kent v. State*, 809 S.W.2d 664, 667-68 (Tex.Ct.App. 1991) (state proceeding to revoke probation for probationer's wiretap of wife in violation of Texas state law borrowed from Title III, both rejecting and distinguishing *Simpson*).

[34]*White v. White*, 618 P.2d 921, 924 (Okla. 1980) ("[T]his court has on numerous occasions held that a party may maintain a tort action against his or her spouse."); *Fiedeer v. Fiedeer*, 140 P. 1022, 1024 (Okla. 1914) (intentional torts); *Courtney v. Courtney*, 87 P.2d 660, 670 (Okla. 1938) (negligence).

[35]*E.g.*, *United States v. Jones*, 542 F.2d at 671-72; *Flynn v. Flynn*, 560 F.Supp. 922, 924 (N.D.Ohio 1983); *Heyman v. Heyman*, 548 F.Supp. 1041, 1047 (N.D.Ill. 1982); *Remington v. Remington*, 393 F.Supp. 898, 902 (E.D.Pa. 1975).

uniform federal policy. *Id.* at 621.[36] The Tenth Circuit discussed interspousal tort immunity in its opinion. (10th, 19a n.8.) Moreover, it is understandable that defendant wishes to disregard the current status of interspousal tort immunity, since the doctrine has been totally or partially abrogated in all but three states in the last few years.[37] The more recent status of the doctrine would be significant assuming the doctrine had relevance at all, since Congress would have been presumed to know of that status when it substantially revised Title III without providing an exception for interspousal wiretapping.[38]

(3) Extraneous Questions.

Defendant's litany of purported line-drawing dilemmas (Pet. for Cert. at 19-20), including the Tenth Circuit's *Newcomb* decision relating to parental wiretapping (*id.* at 16), does not involve electronic surveillance between spouses – which not only is the sole question sought to be presented by defendant but one of the three specific areas which the legislative history of Title III shows the Act was intended to address. (10th, 17a.) The peripheral issues not involving interspousal

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[36]Federal law, not state law, determines whether a federal statute is violated and the effect of that violation. *E.g., Northern Indiana Public Serv. Co. v. Carbon County Coal Co.*, 799 F.2d 265, 273 (7th Cir. 1986); *In re Nucorp Energy Securities Litigation*, 772 F.2d 1486, 1489 (9th Cir. 1985).

[37]*See Interspousal Torts and Divorce: Problems, Policies, Procedures*, 27 J.Fam.L. 489, 490, n.4 (1989) (noting that at that time there were left "only four jurisdictions that bar most forms of interspousal suits: Florida, Georgia, Hawaii, and Illinois."). Illinois statutorily abrogated the doctrine. Ill.Stat. Ch. 40, ¶1001, §1.

[38]*See* Electronic Communications Privacy Act of 1986, Pub.L. No. 99-508, 100 Stat. 1848 (1986). Indeed, this might prompt the Fifth Circuit to abandon even its limited holding in *Simpson* if presented with the same fact situation, since the court partially relied upon the status of the state interspousal tort immunity doctrine as reported more than 20 years ago. *Simpson, supra,* 490 F.2d at 806 n.7.

wiretapping sought to be injected by defendant would thus not require resolution in the review of this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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